

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 12, 2009 Session

RAYMOND D. PLUNK v. OZBURN-HESSEY LOGISTICS, LLC

**Direct Appeal from the Circuit Court for Shelby County
No. CT-004311-05 D'Army Bailey, Judge**

No. W2008-01160-SC-WCM-WC - Mailed April 14, 2009; Filed August 20, 2009

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee alleged that he sustained a hernia in the course of and arising from his employment. Employer denied liability. After a trial on the merits, the trial court ruled in favor of Employer. Employee has appealed, contending that the evidence preponderates against the trial court's finding. Because Employee has not filed a transcript or statement of the evidence, we find that the evidence does not preponderate against the trial court's finding and affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

D. J. ALISSANDRATOS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and TONY CHILDRESS, SP. J., joined.

Russell John Johnson, Memphis, Tennessee for the appellant, Raymond D. Plunk.

David Riley, Memphis, Tennessee for the appellee, Ozburn-Hessey Logistics, LLC.

MEMORANDUM OPINION

Factual and Procedural Background

Raymond Plunk ("Employee") filed a complaint alleging that he sustained a hernia as a result of lifting a heavy object in the course of his work for Ozburn-Hessey Logistics ("Employer") on August 12, 2004. Employer's answer denied that Employee sustained a compensable injury and denied that Employee provided notice of his alleged injury in accordance with the workers'

compensation law.

The record consists of the pleadings, written discovery and responses thereto, the deposition of Employee's pastor, three medical depositions, and the orders of the trial court, including the judgment. From those documents, it can be gleaned that Employee sought medical care for chest pain on August 12, 2004; that at some point thereafter, no later than September 3, 2004, he was diagnosed with a ventral hernia; and that the hernia was repaired by Dr. James Fortune in July 2005.

The judgment states that the case was tried on April 23, 24 and 28, and recites that Employee and two other witnesses testified at the trial. It further states that the trial court issued its findings of fact and conclusions of law from the bench, holding that Employee had failed to carry his burden of proof that he had sustained a compensable injury. The court's findings and conclusions are not in the record.

Employee has appealed, asserting that the evidence preponderates against the judgment. Employer contends that the appeal is frivolous, and requests that a penalty be imposed upon Employee pursuant to Tennessee Code Annotated section 50-6-225(i).

Analysis

Employee did not file a trial transcript, a statement of the evidence, or a notice that he intended to proceed without either, in the trial court. Prior to the briefs being filed in this Court, Employer filed a motion to dismiss the appeal. Employee was ordered to file a response, and he did so. An order was entered on October 28, 2008. That order states, in pertinent part:

The appellant has declined to file "the transcript or statement of the evidence or proceedings" pursuant to Tennessee Rule of Appellate Procedure 24(a). The statement of facts contained in the appellant's brief does not constitute a statement of evidence as contemplated by Tennessee Rule of Appellate Procedure 24(c), see McDonald v. Onoh, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989), and at any rate such a statement would be disfavored in this case because a transcript of the evidence and proceedings below is available. The notice of intent to proceed without a transcript was not timely filed and does not comply with Tennessee Rule of Appellate Procedure 24(d). Finally, the appellant's brief was not timely filed pursuant to Tennessee Rule of Appellate Procedure 29(a).

In spite of these findings, the motion to dismiss was denied based upon "the judicial system's general objective of disposing of cases on the merits." Henry v. Goins, 104 S.W.3d 475, 481 (Tenn. 2003). Employee took no further action to supplement the record.

It is apparent from the limited record, and from the briefs and arguments of the parties, that the issue of liability was contested and that the trial court heard evidence concerning that issue. The substance of that evidence is unknown, however, because Employee has not placed it into the

appellate record. “[W]ithout a transcript or statement of proceedings this Court must presume that every fact admissible under the pleadings was found or should have been found in the appellee’s favor.” McDonald, 772 S.W.2d at 914. Under the circumstances, we are obligated to presume that the testimony presented to the trial court over the course of three days preponderated in favor of Employer’s position that Employee did not sustain a compensable injury.

Employer argues that we should find the appeal frivolous and assess a penalty against Employee pursuant to Tennessee Code Annotated section 50-6-225(i). “The use of [the frivolous appeal statute] is a right which is to be used in obvious cases of frivolity and should not be asserted lightly or granted unless clearly applicable--which is rare.” Parra v. Rieth-Riley Const. Co., No. W1999-00419-WC-R3-CV, 2001 WL 310414, at *2 n.2 (Tenn. Workers’ Comp. Panel March 30, 2001). Upon due consideration, we decline to find this appeal to be frivolous.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Raymond D. Plunk and his surety, for which execution may issue if necessary.

D. J. ALISSANDRATOS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

RAYMOND D. PLUNK v. OZBURN HESSEY LOGISTICS

**Circuit Court for Shelby County
No. CT-004311-05**

No. W2008-01160-SC-WCM-WC - Filed August 20, 2009

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Raymond D. Plunk pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Raymond D. Plunk and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating